

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JASON ARTHUR ALTHEIDE,

Case No.: 2:19-cv-02245-JAD-BNW

Petitioner

## **Order Granting Motion for Stay and Denying Motion to Dismiss without Prejudice**

V

**STATE OF NEVADA, et al.,**

[ECF Nos. 59, 72]

## Respondents

In his 28 U.S.C. § 2254 petition for writ of habeas corpus, Jason Arthur Altheide challenges his conviction, habitual-criminal adjudication, and life sentences, arguing that he received ineffective assistance of counsel when he entered into his guilty plea agreement and at sentencing.<sup>1</sup> Respondents move to dismiss the petition on the basis that some claims are untimely, unexhausted, or procedurally defaulted.<sup>2</sup> Altheide opposes the motion and seeks a stay while he exhausts certain claims in state court.<sup>3</sup> Because I find that Altheide has shown good cause for a stay and abeyance, I grant the motion to stay while Altheide completes his state-court litigation, and I deny the motion to dismiss without prejudice to respondents' ability to renew it once the stay is lifted.

Background

19 The charges against Altheide arose after he was arrested in June 2014 in Beatty, Nevada,  
20 for possession of a stolen vehicle.<sup>4</sup> Altheide and his girlfriend had been living in her car, and he

<sup>1</sup> ECF No. 50.

2 ECF No. 59.

<sup>23</sup><sup>3</sup> Docketed at both ECF Nos. 70, 72.

<sup>4</sup> See ECF No. 50 at 7–9.

1 had driven the car to Beatty from Truckee, California. The charges were dropped, but, because  
 2 the vehicle was not in his name, Altheide was unable to retrieve the vehicle or his belongings  
 3 from it. Released in Pahrump, Nevada, he was arrested again when a gas station employee  
 4 sought to have him removed from the property. Altheide was in custody for one day and, while  
 5 in custody, he was charged with assault on an officer by a prisoner. A couple of months later in  
 6 September, he was charged with battery causing substantial bodily harm for an altercation with a  
 7 McDonald's employee.<sup>5</sup>

8 Altheide entered into a *nolo contendere* plea agreement to battery causing substantial  
 9 harm and battery by prisoner in the Fifth Judicial District Court for Nye County, Nevada.<sup>6</sup> In  
 10 exchange for the guilty plea, prosecutors agreed to dismiss or not pursue charges in seven other  
 11 cases. The plea agreement included a stay-out-of-trouble clause, which would allow prosecutors  
 12 to seek habitual-criminal adjudication if Altheide committed new crimes before sentencing or  
 13 failed to appear for sentencing.<sup>7</sup> Within 30 days of inking that plea agreement, Altheide was  
 14 charged with resisting a peace officer.<sup>8</sup> Several days later he was also charged with felony  
 15 furnishing a dangerous drug without a prescription.<sup>9</sup> The prosecution sought habitual-criminal  
 16 treatment, and in December 2016, the court adjudicated Altheide a habitual criminal and  
 17 sentenced him to two consecutive sentences of life in prison without the possibility of parole.<sup>10</sup>  
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19<sup>5</sup> *Id.*

20<sup>6</sup> Exh. 13. Exhibits to respondents' motion to dismiss, ECF No. 16, are found at ECF Nos. 17–  
 21 20. I refer to petitioner's exhibits as "Pet. Exh." and are found at ECF Nos. 51, 53, 71. The plea  
 agreement encompassed two criminal cases, CR8242 and CR8254.

22<sup>7</sup> Exh. 13.

23<sup>8</sup> Exh. 17 at 4–5.

<sup>9</sup> *Id.*

<sup>10</sup> Exh. 18.

1 Altheide did not file a direct appeal. Instead, he commenced filing a litany of motions to  
 2 modify or correct an illegal sentence as well as state postconviction habeas petitions. Ultimately,  
 3 the state district court held a hearing on two motions to modify and two state habeas petitions  
 4 and denied them all.<sup>11</sup> The Nevada Court of Appeals affirmed in July 2019.<sup>12</sup> Altheide filed  
 5 three more motions to modify and two more state postconviction petitions. The Nevada Court of  
 6 Appeals affirmed the denial of the motions to modify, and an amended judgment of conviction  
 7 was entered to reflect that Altheide was sentenced under the large, not small, habitual-criminal  
 8 statute.<sup>13</sup>

9 Altheide submitted a pro se federal habeas petition in December 2019.<sup>14</sup> Counsel was  
 10 appointed, and an amended petition was filed that sets forth six grounds for relief.<sup>15</sup>  
 11 Respondents move to dismiss, arguing that some grounds are untimely and that all but one of  
 12 Altheide's grounds were unexhausted.<sup>16</sup> In response, Altheide concedes that all grounds except  
 13 ground 4 are unexhausted because he had never presented them to the state courts.<sup>17</sup> He also  
 14 now seeks a stay and abeyance in light of a recent Nevada Supreme Court opinion and due to the  
 15 alleged ineffective assistance of his state postconviction counsel.

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 19<sup>11</sup> Exh. 43.

20<sup>12</sup> Exh. 118.

21<sup>13</sup> See, e.g., ECF No. 19-34, Exh. 124; ECF No. 19-37, 127; ECF No. 20-4, 134; ECF No. 20-5,  
 22 135; ECF No. 20-8, 138; ECF No. 20-9, 139; ECF No. 20-12, 142; ECF No. 20-14, Exh. 144.

<sup>14</sup> ECF No. 1-1.

23<sup>15</sup> ECF No. 50.

<sup>16</sup> ECF No. 59.

<sup>17</sup> ECF No. 72 at 2.

## Discussion

A. With good cause, the court may stay a federal habeas petition pending state-court exhaustion.

Because a habeas petitioner must give the state courts a fair opportunity to act on each of his claims before he presents them in a federal habeas petition, the federal court will not consider a state prisoner's petition for habeas relief until he has properly exhausted his available state remedies for all claims raised.<sup>18</sup> A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral-review proceedings.<sup>19</sup> To properly exhaust state remedies on each claim, the habeas petitioner must "present the state courts with the same claim he urges upon the federal court."<sup>20</sup>

11        Although dismissal is the typical remedy for a petition that contains unexhausted claims,  
12 in *Rhines v. Weber*, the United States Supreme Court held that a federal habeas case can be  
13 stayed in “limited circumstances” to allow the petitioner to present unexhausted claims to the  
14 state court without losing his right to federal habeas review due to the relevant one-year statute  
15 of limitations.<sup>21</sup> Under the *Rhines* test, “a district court must stay a mixed petition only if: (1) the  
16 petitioner has ‘good cause’ for his failure to exhaust his claims in state court; (2) the unexhausted

<sup>20</sup> <sup>18</sup> *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b).

<sup>21</sup> <sup>19</sup> *O'Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

<sup>22</sup> <sup>20</sup> *Picard v. Connor*, 404 U.S. 270, 276 (1971).

<sup>23</sup> <sup>21</sup> *Rhines v. Weber*, 544 U.S. 269, 273–75 (2005); *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016) (holding that district courts have authority to stay and hold in abeyance both mixed petitions and “fully unexhausted petitions under the circumstances set forth in *Rhines*”).

1 claims are potentially meritorious; and (3) there is no indication that the petitioner intentionally  
 2 engaged in dilatory litigation tactics.”<sup>22</sup>

3       The Ninth Circuit has acknowledged that the *Rhines* “good cause” standard does not  
 4 require “extraordinary circumstances.”<sup>23</sup> But courts “must interpret whether a petitioner has  
 5 ‘good cause’ for a failure to exhaust in light of the Supreme Court’s instruction in *Rhines* that the  
 6 district court should only stay mixed petitions in ‘limited circumstances.’”<sup>24</sup> Courts must also  
 7 “be mindful that” the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) “aims to  
 8 encourage the finality of sentences and to encourage petitioners to exhaust their claims in state  
 9 court before filing in federal court.”<sup>25</sup>

10        “[G]ood cause turns on whether the petitioner can set forth a reasonable excuse,  
 11 supported by sufficient evidence, to justify” the failure to exhaust a claim in state court.<sup>26</sup>  
 12 “While a bald assertion cannot amount to a showing of good cause, a reasonable excuse,  
 13 supported by evidence to justify a petitioner’s failure to exhaust, will.”<sup>27</sup> The Supreme Court’s  
 14 opinion in *Pace v. DiGuglielmo*,<sup>28</sup> suggests that this standard is not particularly stringent, as the  
 15 High Court held that “[a] petitioner’s reasonable confusion about whether a state filing would be  
 16 timely will ordinarily constitute ‘good cause’ to excuse his failure to exhaust.”<sup>29</sup>

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 18 <sup>22</sup> *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008) (citing *Rhines*, 544 U.S. at 278).

19 <sup>23</sup> *Id.* at 1024 (citing *Jackson v. Roe*, 425 F.3d 654, 661–62 (9th Cir. 2005)).

20 <sup>24</sup> *Id.* (citing *Jackson*, 425 F.3d at 661).

21 <sup>25</sup> *Id.* (citing *Rhines*, 544 U.S. at 276–77).

22 <sup>26</sup> *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014).

23 <sup>27</sup> *Id.*

<sup>28</sup> *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

<sup>29</sup> *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). See also *Jackson*, 425 F.3d at 661–62 (the application of an “extraordinary circumstances” standard does not comport with the “good cause” standard prescribed by *Rhines*).

1     **B. Altheide has shown good cause to stay his petition pending state-court exhaustion.**

2         Altheide contends that a *Rhines* stay is warranted here. First, Altheide states that his state  
 3 postconviction counsel did not bring any claims related to counsel's performance at sentencing  
 4 because the relevant statute did not expressly allow that type of postconviction claim.<sup>30</sup> A  
 5 petitioner may assert a challenge under Nevada Revised Statute (NRS) 34.810(1)(a) to a  
 6 conviction by guilty plea on the bases that the plea was not voluntarily or knowingly entered or  
 7 the plea was entered without effective assistance of counsel. The Nevada Supreme Court  
 8 recently held in *Gonzales v. State* that this statute does not bar a petitioner from raising in state  
 9 postconviction proceedings the claim that he received ineffective assistance of counsel at  
 10 sentencing.<sup>31</sup> The Court concluded that the core claims that NRS 34.810(1)(a) prohibits are  
 11 “independent claims relating to the deprivation of constitutional rights that occurred prior to the  
 12 entry of the guilty plea” that do not allege that the guilty plea was entered involuntarily or  
 13 unknowingly or without effective assistance of counsel.<sup>32</sup> Respondents argue that *Gonzales* is  
 14 not new law because the Court merely “explicitly [held] what has been implicit in our caselaw  
 15 for decades.”<sup>33</sup> However, Altheide points to a recent, unpublished Nevada Court of Appeals  
 16 case in which District Court Judge Robert W. Lane—the same judge who presided over  
 17 Altheide’s state postconviction petition—erroneously found that the petitioner’s claims  
 18 challenging counsel’s performance only at sentencing were outside the scope of a petition

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 20 <sup>30</sup> ECF No. 72 at 9; NRS 34.810(1)(a) requires a district court to dismiss a postconviction habeas  
 21 corpus petition if “[t]he petitioner’s conviction was upon a plea of guilty or guilty but mentally  
 22 ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly  
 23 entered or that the plea was entered without effective assistance of counsel.”

<sup>31</sup> *Gonzales v. State*, 492 P.3d 556 (Nev. 2021).

<sup>32</sup> *Id.* at 562 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)).

<sup>33</sup> *Id.*

1 challenging a judgment of conviction upon a guilty plea.<sup>34</sup> The petition in that case was filed in  
 2 2020.

3 Altheide also argues that his first state postconviction counsel was ineffective for failing  
 4 to present several claims.<sup>35</sup> In *Martinez v. Ryan*, the United States Supreme Court held that, in a  
 5 case in which “under state law, claims of ineffective assistance of trial counsel must be raised in  
 6 an initial-review collateral proceeding, a procedural default will not bar a federal habeas court  
 7 from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral  
 8 proceeding, there was no counsel or counsel in that proceeding was ineffective.”<sup>36</sup> In *Blake v.*  
 9 *Baker*, the Ninth Circuit held that the sort of ineffective assistance of counsel in an initial-review  
 10 collateral proceeding described in *Martinez* can be good cause for a *Rhines* stay.<sup>37</sup>

11 I find that Altheide has shown good cause for his failure to exhaust at least some of his  
 12 claims in state court. In grounds 1, 2, and 3, Altheide alleges that his plea counsel was  
 13 ineffective for “abandoning Altheide at critical stages of the proceedings” (ground 1);  
 14 representing him despite a clear conflict of interest (ground 2); and failing to investigate and  
 15 present possible defenses, with the result that the plea was not entered knowingly, voluntarily  
 16 and intelligently (ground 3).<sup>38</sup> Related to sentencing, in ground 5 Altheide argues that his  
 17 counsel was ineffective for (A) failing to investigate and present mitigation evidence regarding  
 18 his history of severe mental illness; (B) failing to investigate whether the state met its burden to  
 19 show Altheide was a habitual criminal and argue the invalidity of his prior convictions at  
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21 <sup>34</sup> *Austin v. State*, 2022 WL 1090296 \*2 (Nev. App. 2022) (citing *Gonzales*, 492 P.3d at 562).

22 <sup>35</sup> ECF No. 72. Respondents do not address this argument. See ECF No. 81.

23 <sup>36</sup> *Martinez v. Ryan*, 566 U.S. 1, 17 (2012).

<sup>37</sup> *Blake*, 745 F.3d at 982–84.

<sup>38</sup> ECF No. 50 at 41–55.

1 sentencing; and (C) failing to gather statements or testimony from family and friends to present  
 2 at sentencing.<sup>39</sup> In ground 6, Altheide contends that counsel was ineffective for failing to argue  
 3 at sentencing that a sentence of life without the possibility of parole violated his Eighth  
 4 Amendment rights to be free from cruel and unusual punishment.<sup>40</sup>

5 According to Altheide, the attorney who handled his state habeas action performed  
 6 ineffectively by failing to raise these claims.<sup>41</sup> For example, Altheide states that grounds 5 and 6  
 7 rely on evidence that state postconviction counsel did not obtain—copious medical records, an  
 8 expert evaluation of the records, documentation of his past criminal history, and declarations  
 9 from family members.<sup>42</sup> In *Blake*, the petitioner argued that he failed to exhaust his ineffective-  
 10 assistance-of-trial-counsel claim because his state postconviction counsel failed to conduct any  
 11 independent investigation or retain experts.<sup>43</sup> Blake's federal postconviction counsel supported  
 12 the good-cause argument with evidence of Blake's abusive upbringing and history of mental  
 13 illness, including a neuropsychological and psychological evaluation report that demonstrated  
 14 serious mental illness and numerous declarations from family and friends that detailed the  
 15 abhorrent conditions of his upbringing. Here, Altheide's federal postconviction counsel has  
 16 provided a clinical neuropsychologist's report based on his review of about 7500 pages of  
 17 Altheide's medical records that demonstrate a 20-year history of serious mental illness and  
 18 polysubstance abuse.<sup>44</sup> She provided voluminous medical records showing numerous

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20 <sup>39</sup> *Id.* at 57–65.

21 <sup>40</sup> *Id.* at 65–66.

22 <sup>41</sup> ECF No. 72 at 10–11.

<sup>42</sup> *Id.* at 12.

<sup>43</sup> *Blake*, 745 F.3d at 983.

<sup>44</sup> See ECF No. 53.

1 hospitalizations in mental-health facilities since 2001, as well as family members' statements  
 2 that Blake had been homeless much of his adult life and exhibited delusional and psychotic  
 3 behaviors whenever he went off his psychiatric medications. As in *Blake*, Altheide's showing of  
 4 good cause is not "a bare allegation of state postconviction [ineffective assistance], but a  
 5 concrete and reasonable excuse, supported by evidence that his state post-conviction counsel  
 6 failed to" present substantial claims to the state courts.<sup>45</sup>

7       The alternative argument that Altheide's state postconviction counsel failed to assert  
 8 claims that plea counsel was ineffective at sentencing because that claim was not expressly  
 9 permitted by the statute at the time of Altheide's first round of state collateral proceedings is  
 10 perhaps a less persuasive basis for good cause. The Nevada Supreme Court has previously  
 11 considered ineffective-assistance-of-counsel-at-sentencing claims by defendants who pleaded  
 12 guilty,<sup>46</sup> but in the 2021 *Gonzales* case, the Court said that it was required "to decide whether a  
 13 defendant who pleads guilty may challenge his sentence on the ground that he received  
 14 ineffective assistance of counsel at the post-plea sentencing hearing."<sup>47</sup> And the Nevada Court  
 15 of Appeals recently stated that the state district court judge who presided over Altheide's state  
 16 postconviction proceedings erroneously concluded in a different case that claims of ineffective  
 17 assistance of counsel at sentencing were outside the scope of a petition challenging a judgment

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21<sup>45</sup> *Id.*

22<sup>46</sup> See *Kirksey v. State*, 112 Nev. 980, 994–97 (Nev. 1996). I note, however, that out of the six  
 23 cases respondents cite to support their contention that the Nevada courts have long considered  
 this type of claim, this is the only case that actually involves a guilty plea and allegations of  
 ineffective assistance of counsel at sentencing. See ECF No. 81 at 2–3.

<sup>47</sup> *Gonzales*, 492 P.3d at 558.

1 of conviction challenging a guilty plea.<sup>48</sup> In any event, I find that Altheide has demonstrated  
 2 good cause.

3 Respondents do not argue that Altheide fails to meet the remaining requirements for a  
 4 *Rhines* stay, and I find that Altheide has also established that “at least one of his unexhausted  
 5 claims is not ‘plainly meritless.’”<sup>49</sup> “In determining whether a claim is ‘plainly meritless,’  
 6 principles of comity and federalism demand that the federal court refrain from ruling on the  
 7 merits of the claim unless ‘it is perfectly clear that the petitioner has no hope of prevailing.’”<sup>50</sup> I  
 8 conclude that Altheide’s unexhausted grounds are not plainly meritless. In ground 5, he alleges  
 9 that counsel rendered ineffective assistance by failing to investigate and present mitigation  
 10 evidence at sentencing, including the large volume of mental health records documenting serious  
 11 mental illness beginning around age 19 and statements from family and friends and for failing to  
 12 argue the invalidity of his prior convictions at sentencing.<sup>51</sup> Altheide argues that such mitigation  
 13 evidence would have had an effect at sentencing, in which the judge sentenced him to two life  
 14 sentences without the possibility of parole.<sup>52</sup> I cannot conclude at this time that “it is perfectly  
 15 clear that [Altheide] has no hope of prevailing” on this claim.<sup>53</sup> And there is no indication in the  
 16 record that Altheide has “intentionally engaged in dilatory litigation tactics.”<sup>54</sup>

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18<sup>48</sup> *Austin*, 2022 WL 1090296 \*2 (citing *Gonzales*, 492 P.3d at 562).

19<sup>49</sup> *Dixon v. Baker*, 847 F.3d 714, 722 (9th Cir. 2017).

20<sup>50</sup> *Id.* (quoting *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005)).

21<sup>51</sup> ECF No. 72 at 8.

22<sup>52</sup> *Id.* at 12.

23<sup>53</sup> *Dixon*, 847 F.3d at 722 (quoting *Cassett*, 406 F.3d at 624).

<sup>54</sup> *Wooten*, 540 F.3d at 1023 (citing *Rhines*, 544 U.S. at 278). See also *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010), vacated for reconsideration on other grounds, 562 U.S. 1196 (2011) (petitioner “had not engaged in dilatory tactics and he had no motivation for delay, as he is not a capital defendant”).

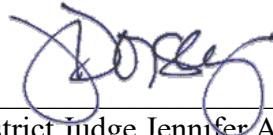
1 Finally, I note that this is a case involving allegations of decades of serious mental illness  
2 and lapses in treatment. Altheide alleges that he did not have a particularly violent criminal  
3 history. He also claims that his multiple attorneys through his guilty plea, direct appeal, and first  
4 state postconviction proceedings were deficient in attempting to secure him mental-health  
5 treatment and providing readily available evidence to the courts of his mental illness. The state  
6 district court sentenced him to the most severe sentence available, save a capital sentence. Thus,  
7 I will stay this action pending exhaustion of the unexhausted grounds in the first-amended  
8 petition. And because I am staying this case, I deny the respondents' motion to dismiss without  
9 prejudice to their ability to file a new dismissal motion once the stay is lifted.

10 **Conclusion**

11 IT IS THEREFORE ORDERED that petitioner's motion for a stay and abeyance  
12 [ECF No. 72] is GRANTED. THIS CASE IS STAYED pending exhaustion of the  
13 unexhausted grounds in the first-amended petition. This stay is conditioned upon petitioner  
14 litigating his state postconviction petition or other appropriate proceeding in state court and  
15 returning to federal court with a motion to reopen within 45 days of issuance of the remittitur by  
16 the state appellate court at the conclusion of the state-court proceedings.

17 IT IS FURTHER ORDERED that respondents' motion to dismiss [ECF No. 59] is  
18 DENIED without prejudice as moot.

19 IT IS FURTHER ORDERED that the Clerk of Court is directed to  
20 ADMINISTRATIVELY CLOSE this case. Once the state-court proceedings are completed,  
21 any party may move to reopen this case.

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23 U.S. District Judge Jennifer A. Dorsey  
Dated: March 27, 2023